CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-11-036133-094

SUPERIOR COURT

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBI BOWATER INC.,

And

ABITIBI-CONSOLIDATED INC.,

And

BOWATER CANADIAN HOLDINGS INC., and the other Petitioners listed on Schedules A, B. and C

Debtors

And

ERNST & YOUNG INC.

Monitor

And

VIATEUR CAMIRÈ,
Domiciled at 231 DuMont St-Michel, Boucherville, Québec J4B 7T6

Representative

And

WILLIAM SHEFFIELD acting for and on behalf of the Ad Hoc Committee of Secured SERP and MSBA participants

Respondent

CONTESTATION OF THE MOTION FOR THE APPOINTMENT OF A REPRESENTATIVE AND SOLICITORS FOR THE PETITIONERS' CANADIAN NON-UNIONIZED FORMER EMPLOYEES AND OTHER BENEFICIARIES OF THE PENSION PLANS

IN CONTESTATION OF THE MOTION FOR THE APPOINTMENT OF A REPRESENTATIVE AND SOLICITORS FOR THE PETITIONER'S CANADIAN NON-UNIONIZED FORMER EMPLOYEES AND OTHER BENEFICIARIES OF THE PENSION PLANS, THE RESPONDENT WILLIAM SHEFFIELD ON BEHALF OF THE AD HOC COMMITTEE OF SECURED SERP AND MSBA PARTICIPANTS, SUBMITS THE FOLLOWING:

A. Background

Overview of the Motion and Contestation

1. On April 17, 2009, this Honourable Court issued an Order granting the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to the Petitioners (hereinafter referred to collectively as the "Abitibi Group"). On May 6, 2009 this Honourable Court issued the Second Amended Initial Order to the Abitibi Group.

2. Abitibi Consolidated Inc. (the "ACI") has used powers under that Second Amended Initial Order to suspend and/or terminate the payment of entitlements under a certain Senior Executive Retirement Plan (the "SERP") established by ACI in 1999, and entitlements under a Management Supplementary Benefit Plan established in 1987, (the "MSBA") which supplements the SERP. The members of these plans (collectively referred to hereinafter as "Secured SERPs") have special secured entitlements and remedies distinct from other non-unionized former Abitibi Group employees, as further described below.

3. There are believed to be 87 Secured SERPS. Shortly after it filed, the Abitibi Group estimated the unfunded liability to all SERPs (secured and unfunded) to be $77 million. ACI has not disclosed what proportion of the unfunded deficiency pertains to Secured SERPs. There is believed to be $62 million of cash collateral held by Desjardin Trust Inc., the trustee for those claims, composed of cash on hand pre-filing of about $6 million and $56 million from the proceeds of certain letters of credit.

4. Informal steps were taken to organize a group for Secured SERPs over the summer to ensure there was an effective voice dedicated specifically to Secured SERP issues. Effective September 1, 2009, an *ad hoc* committee of Secured SERPS was formally constituted for the Secured SERPs Group, with a view to protecting, advancing and negotiating the interests of the Secured SERPs in relation to their secured entitlement and their rights and remedies in respect of any deficiency claim (the *Ad Hoc* Committee is hereinafter referred to as the "Secured SERP Committee"). The membership of which group now consists of almost 40% in value and almost 30% in number of all Secured SERPs and is growing. The Secured SERP Committee and the group of Secured SERPs are self funded and membership in the overall group is open to all Secured SERPs.

5. A separate group of former Abitibi employees has also been formed, which claims membership at present of roughly 3-4% of the 7500 former non-unionized Abitibi employees (the "Unsecured Former Employee Group"). Unlike the Secured SERP Group

which has a limited, focussed mandate specific to the concerns of Secured SERPs, the Unsecured Former Employee Group seeks to represent all 7500, predominatly unsecured former non-unionized employees primarily in respect of other matters, unrelated to the Secured SERPs, including registered pensions, benefits, severance claims and other matters outside the purview and mandate of the Secured SERP Group.

6. Members of the Secured SERP's Committee and of the Unsecured Former Employees Group steering committee have been in a dialogue about how to handle representation issues since the summer. Since its formation, the Secured SERP Committee has clearly communicated its intent to ensure that Secured SERP issues were not swept into a global former employee's representative group, because the two groups have representation needs and objectives that are different, incompatible and are better served by separate representation.

7. On October 1, 2009, the Unsecured Former Employees Group steering committee filed a motion which seeks to include the Secured SERP's within the Unsecured Former Employees Group. A further dialogue ensued about how to carve out the Secured SERP issues from the mandate sought by the Unsecured Former Employee Group. Suggestions were exchanged. However, on November 5, 2009, the Unsecured Former Employee Group steering committee filed an amended motion that contained no carve out provision.

8. The Secured SERP Committee does not oppose the formation of an Unsecured Former Employees Group, but is requesting that the definition of the interests represented by that group exclude any issues pertaining to Secured SERP entitlements. For the reasons explained below, these are best dealt with separately by the Secured SERP Committee, and Secured SERP interests will be prejudiced if these are swept into the mandate of the Unsecured Former Employees Group.

9. Accordingly, at this time, the Secured SERP Committee is opposing the Unsecured Former Employees Group steering committee motion only to that extent, and reserves its rights to later bring a motion for representative status, if it is deemed to be beneficial and necessary to protect and advance Secured SERP issues.

The Secured SERP Plans/The SERP Trust

10. On or about January 1, 1999, ACI established the SERP for certain executive employees of ACI. (The 1999 plan replaced other plans previously in existence, certain of which, were rolled into the 1999 plan).

11. In addition, the MSBA was set up in 1987 which supplements the SERP for certain SERP plan members. The MSBA and the SERP are referred to collectively herein variously as the "SERP Plans" and the "SERP".

12. The SERP and the MSBA were and are intended to be fully secured plans. Specifically, the plans required that benefits for Secured SERPs be secured *via* the establishment of a secured trust, backed by cash and letters of credit for the full amount of the outstanding SERP and MSBA liability from time to time. Said secured trust was established on April

23, 2004 and Desjardins Trust Inc. ("Desjardins") appointed as trustee. As stated above, the SERP/MSBA members are therefore referred to herein as "Secured SERPs" and their secured plans, occasionally as the "Secured SERP Plans".

13. The Secured SERPs are the beneficiaries of the secured trust.

Secured SERP Group Membership

14. The Secured SERPs group is believed to consist of 87 individuals, almost all of whom are believed to have been identified by the Secured SERP Committee. However, the actual full and complete list of the Secured SERPs is known only to ACI and Desjardins as the parties to the secured trust arrangement; for privacy reasons, they have not been able to share the list with the Secured SERP Committee. For that reason, the Secured SERP Committee has had to invest considerable time and effort in identifying the Secured SERPs name and contact information on its own. To assist the Secured SERP Committee in its efforts to communicate with other Secured SERPs, the Petitioners transmitted a communication on behalf of the Secured SERP Committee to its Secured SERP mailing list. The communication informed Secured SERPs about the role of the Secured SERP Committee and Group and about terms under which they can become members of the Secured SERP Group.

The Security for the Secured SERP Entitlements

15. The SERP Plans contain a commitment that plan entitlement shall be fully secured. This commitment was implemented in part by ACI through its Trust Agreement with Desjardins, which required that security for the SERP Plans be created by ACI by way of the provision by ACI as Trustor to Desjardins as trustee of a cash reserve plus letters of credit (the "LCs") which in aggregate would equal the full amount of the outstanding present and future liability of ACI to the members of the SERP Plans. The Trust required the LCs to be amended yearly to increase the value of the LCs to take account of any increases in the estimated liability of ACI to the Secured SERPs from time to time.

16. Further to these arrangements, ACI was supposed to pay 10% of the estimated SERP liability from time to time in cash to Desjardins as a reserve fund for these entitlements. That fund now held by Desjardins is currently believed to be in excess of $6 million.

17. In addition, LCs were issued by ACI in favour of Desjardins, which were available to be called if ACI defaulted on the payments to the Secured SERPs. The LCs were revised annually by ACI. This revision process was supposed to ensure the SERPs were at all times fully secured. The most recent LCs which were issued totaling roughly $56 million, made up of two (2) LCs of roughly $40 million and $16 million.

B. ACI's CCAA Filing and Default under the SERP Plans

18. ACI filed for CCAA protection in April 2009.

19. In May 2009, ACI advised the Secured SERPs that it was ceasing payments on the SERP plans.

20. Between May and July 2009, Desjardins contacted each of the Secured SERPs to confirm they were on its list of Secured SERPs, and to advise that pursuant to the Trust Agreement, it was drawing down on the LCs on account of ACI's default.

21. Desjardins is believed to have drawn down the full amount of the LCs, and hence is believed to have over $62 million in the SERP Trust.

C. The *Ad Hoc* Secured SERP Committee and Group

Formation of the Ad Hoc Secured SERP Committee and Group

22. In the summer, a number of the Secured SERPs banded together to form an *ad hoc* committee of Secured SERPs, and then formally constituted a Secured SERP Group on September 1, 2009.

23. The current membership of that Group is almost 30% of the total Secured SERP membership (25 out of the total of 87 potential members) and growing.

24. By value, the group is roughly estimated to represents almost 40% of the total Secured SERPs (the value calculation requires a number of actuarial assumptions – therefore this is just a rough estimate using simplified assumptions).

25. The remaining Secured SERPs have been invited to join by way of direct communications where possible, and by way of the mailing sent on behalf of the Group by the Petitioners recently. The membership of the Group has continued to grow since its formation on September 1, 2009.

Organization and Operation of the Ad Hoc Secured SERP Committee

26. The purpose of the *Ad Hoc* Secured SERP Committee is to represent Secured SERPs as a whole on all issues pertaining to the SERP Plans, the trust, maximizing recovery, any deficiency in the funding of their entitlements, defending any claims to the security that was granted for their entitlements and all ancillary issues in relation to each of those matters. That includes their rights to receive payments from Desjardins under the SERP Plans and the trust, their rights in the ACI CCAA process, including treatment of their proofs of claims, priority or other enhanced status for their claims, classification, plan negotiations and voting, and any residual entitlements and remedies they may have in respect of the deficiency beyond rights against ACI and its estate.

27. The Secured SERPs Group has a constitution which governs how the Group operates.

28. The Secured SERPs committee respectively consists of four (4) members (but there's room for five (5)) which hold weekly conference calls in which all group members are entitled to participate. The current members of the committee are:

(i) William Sheffield;

(ii) Jean-Claude Casavant;

(iii)Andre Hattum; and

(iv)Bob Hache.

29. The Secured SERPs Committee has formed various subcommittees dealing with specific issues of concern to the Secured SERPs, including the following:

(a) Finance:

Bruno Tremblay, Ed Pett, Bob Hache;

(b) Recruiting:

Raymond Bourdages, Ron McKelvie, Bob Hache; and

(c) Desjardins:

Andre Van Hattum, Bruno Tremblay, Alain Croisetiere.

30. Each member of the Secured SERPs Group has formally retained Baker & McKenzie LLP ("B&M") as counsel and has consented to the Secured SERPs Committee instructing B&M on day to day matters. Any legal initiative requiring significant funds requires the approval of 2/3 of the members of the Secured SERPs Group.

31. The Secured SERPs Committee instructs B&M as counsel and seeks approval of all members as directed under the Group constitution.

32. The Secured SERPs Group's legal costs are funded directly by the members of the Group on a sharing formula *pro rata* to their ultimate individual entitlements; no funding for the Group's activities has been provided by ACI or any other external party.

33. The constitution provides that new Secured SERPS may join the Secured SERP Group, on the same terms as the members who have already joined, including picking up their *pro rata* share of the legal expenses of the Group.

Interaction with the Unsecured Former Employees Group

34. There are an estimated 7,500 retirees of ACI.

35. A group of these retirees have also formed an *ad hoc* committee of former ACI retirees, which has a steering committee.

36. Originally, this steering committee retained the law firm BCF LLP as their counsel. BCF LLP has since been replaced in that role by Davis LLP.

37. Currently this other committee has received indications from about 250-350 former retirees, mostly unsecured employees, that they would like to be members of the group. That represents approximately 3-4% of the total universe of former Abitibi Group non unionized employees.

38. Over the summer, while these two groups (the Secured SERPs Group and this other group mentioned above – being previously defined as the Unsecured Former Employees Group) were being formed, there were ongoing discussions between members of what would become the respective steering committees of each group, as to the desire of Secured SERP members to deal separately with their issues rather than be part of a much broader and amorphous former employees group.

The Unsecured Former Employees Group Motion

39. On or about October 1, 2009, Viateur Camirè as proposed representative of all former employees of the Petitioners brought a motion seeking his appointment as representative and the appointment of the law firm of BCF LLP as representative counsel for all former employees of the petitioners in the proposed group. That motion defined the mandate of the proposed group of former employees of the Petitioners to include Secured SERP issues.

40. No date was set for the hearing for the motion.

41. On November 5, 2009, that motion was amended to replace BCF as the proposed group counsel and re-filed as an amended motion. Davis LLP was nominated as the counsel for the proposed former employees group. That amended motion (referred to as the "Davis Group Motion") once again defined the mandate of the proposed group to include Secured SERP issues, notwithstanding the protestation of the Secured SERPs Committee.

42. The Secured SERP Committee has indicated to the Unsecured Former Employees Group that it does not wish the Secured SERP issues to be part of the mandate of the Davis Group Motion and that those issues should be represented instead by the Secured SERP Committee and B&M.

43. The steering committees of the two groups have continued to discuss procedures to carve out the Secured SERP issues from the proposed mandate of the Davis Group Motion being sought, but have not yet reached a solution. As the Unsecured Former Employees Group is pressing on with its motion, the Secured SERP Group has no choice but to appear and oppose the inclusion of the Secured SERP issues within the Davis Group Motion mandate.

D. Position of the Secured SERP Group on the Unsecured Former Employees Motion

44. While the Secured SERPs Committee Group does not otherwise oppose the Davis Group Motion, the Secured SERP Group does oppose its inclusion (and the inclusion of its issues) in the proposed group that would be represented by the Unsecured Former Employees Group for the following reasons:

Secured Versus Unsecured:

a. Members of the Secured SERP Group are secured creditors of ACI, unlike the members of the Unsecured Former Employees Group, who are largely unsecured creditors. Specifically, members of the proposed Unsecured Former Employees Group are largely unsecured ordinary employees and former employees of the Petitioners and are unsecured creditors of the estate with potentially limited rights and remedies. Moreover, the bulk of the proposed group will more likely be focused on pension issues as opposed to retirement benefit issues.

b. In contrast, Secured SERPs have the benefit of a secured trust to look to for both recovery and for consideration if, and when, there is a plan of compromise or arrangement to consider. It would be impossible for Mr. Camirè and counsel to properly advise the Secured SERPs if they are also advising unsecured creditors as the advice to the two groups, secured versus unsecured, will likely be very different and conflicting.

Partial vs. Full Representation

c. The Davis Group Motion does not extend to representing Secured SERP claims against the SERP Trust, and to realizing on its security. While any exact deficiency is not yet known, whereas ACI has asserted that there is an unfunded $77 million liability to all SERPs (secured and unsecured), ACI has not indicated what proportion if any is attributable to the secured SERPs. As there is $62 million in the SERP Trust, clearly one of, if not the most important interest for the Secured SERPs is protecting and realizing on that entitlement.

d. Instead, the Davis Group Motion appears to seek to represent the Secured SERPS only on the deficiency on the realization upon the cash portion of their security. That would bifurcate the representation of the Secured SERP entitlements. It makes more sense to put all of the Secured SERP issues into the hands of a single representative, in this case the already existing Secured SERPs Group and Committee.

Differential Remedies and Informational Needs

e. Not only are the Secured SERPs distinguished by the cash collateral they have in trust, but they are also the beneficiaries of a continuing commitment directly from the Petitioners to provide full security for their entitlements. The Secured SERPs believe that they have unique remedies and information gathering needs that flow from these facts which are different from all of the other former employee entitlements.

f. The information and disclosure requirements on those issues are different from the needs of the other former employees which are best pursued by a separate Secured SERP group instructing its own counsel.

g. The procedures under the trust to value the Secured SERP entitlements against the cash collateral proceeds through a process defined by the SERP trust is different from any of the Petitioners registered pensions.

Plan Treatment/Classification/Releases

h. The Unsecured Former Employees Group in its motion seeks the ability to negotiate classification, plan treatment for the entire proposed former employees group and to grant releases to the Petitioners and third parties through the plan process. As the Secured SERPs are contending for different treatment on those issues from the balance of the former employees group based on what they contend are different entitlements, there appears to be an inherent conflict of interest in including them in the group, and any single representative would be in an unworkable position trying to wear both hats. For example, the Davis Group Motion seeks to appoint a consulting committee that together with counsel would determine, file, advance, or compromise all claims of the creditors in the proposed employee group. This is particularly troublesome for Secured SERP members because the proposed consulting committee will be composed largely by representatives of unsecured creditors leading to the likelihood that a largely unsecured creditor committee could speak for, determine and compromise the secured claims and enhanced deficiency remedies of the Petitioners estate and third parties who may be covered by the plan and releases granted through the plan.

Secured SERP Concerns with the Davis Group Motion

i) Conflict on SERP Issues of the Former Employee Steering Committee

45. One or more members of the Former Unsecured Employees Group may have laid secured SERP claims that were rejected, putting them in possible conflict with accepted Secured SERP claims.

ii) Opt Out Proposal Creates Bifurcated SERP representatives

46. The opt-out provision that is proposed by the Davis Group Motion does not provide for Secured SERP members to be protected as is suggested by the Davis Group Motion. It puts the *onus* on Secured SERP members to opt out of the proposed group. While a very substantial portion have already opted out through the Secured SERP Group, and that number is expected to grow, it guarantees a situation, where there is no single voice for the Secured SERPS - there will be two groups with inconsistent mandates.

47. As well, it could lead to a situation where some SERP members' rights are voted by the Unsecured Former Employees Group's proposed committee while those that opt out vote in another direction.

iii) Membership Claims of the Former Employee Group are Inaccurate

48. At one time the Unsecured Former Employees Group claimed that its supporters included 42 Secured SERP members. The Camirè affidavit makes that assertion without offering evidence of the actual adherence of any of those people to the proposed group or any evidence as to the procedure followed to secure that adherence. Since that claim was made, at least 9 of those people identified in the Davis Group Motion have opted out of the Unsecured Former Employees Group, and still others have advised the Secured SERP Group that they never agreed to join the proposed Unsecured Former Employees Group in the first place.

49. Everyone who has joined the Secured SERP Group has signed onto clear and specific retainer terms which incorporate the Secured SERP Group constitution. In contrast, it appears that the Unsecured Former Employees Group is using a looser definition of who is a member and has not adequately ascertained, verified and documented the membership of all those it is claiming to be supporters.

iv) Inadequate Disclosure

50. The Davis Group Motion does not disclose the solicitation materials used to induce people to support its group. Information which reached the Secured SERP members from that group was not sufficiently informative to allow Secured SERPs to understand how their entitlements differed from the rest of the group or the pros and cons of separate representation.

51. The motion brought by Unsecured Former Employees Group does not set out any ground, reason or explanation on why the secured SERP members should be included in the larger proposed group or how their specific interests will be protected.

52. In short, the interests of Secured SERPs are best served outside of the ambit and control of the Unsecured Former Employees Group and its counsel.

53. This contestation is well-founded on fact and law.

WHEREFORE, MAY IT PLEASE THIS COURT TO:

1. DISMISS Viateur Camirè's motion to the extent it seeks to include any person or persons in connection with issues pertaining to Secured SERP Entitlements (as defined below) as being represented by the Representative or Representative Counsel.

2. ORDERS that the following paragraphs be inserted into the Order for the Amended Motion for the Appointment of a Representative and Solicitors for the Petitioners Canadian Non-Unionized Former Employees and Other Beneficiaries:

> (i) Notwithstanding anything to the contrary contained in this Order, Representative and Representative Counsel shall not represent any person or persons in connection with issues pertaining to secured entitlements (known as, "Secured SERP Entitlements") owing to such person or persons ("Secured SERPs ") under the Senior Executive Retirement Plan established by Abitibi Consolidated Inc. ("ACI") in 1999 and the Management Supplementary Benefit Plan established in 1987 (collectively, the "SERP") including, without limitation, in connection with the following:
>
> a. All issues involving the letters of credit which secure the Secured SERP Entitlements, the trust agreements which govern the SERP (including the Supplementary Executive Retirement Compensation Arrangement Trust Agreement dated April 23, 2004), the funds administered by Desjardins, and the process by which Desjardins will calculate and make payouts to the Secured SERPs.
>
> b. All claims in respect of any deficiency owing to Secured SERPs net of the payments received from Desjardins ("Secured SERP Deficiency Claims"), including claims relating to defending any claims by non-secured SERPs against the security of LCs; underfunding of security commitment; preparation of proofs of claim and amending proofs of claim; additional and enhanced remedies against ACI and other persons/entities; negotiations regarding the foregoing.
>
> c. All issues pertaining to the SERPs and the Secured SERP Deficiency Claims in the CCAA process, including classification of Secured SERP Deficiency Claims, plan treatment and terms, releases under the plan, court order or otherwise and negotiations in connection with the foregoing.
>
> d. Any release of any rights of Secured SERP Entitlements pertaining in any way to the Secured SERPs, the SERPs or the Secured SERP Deficiency Claims.
>
> e. Protection of any SERP funds held by and/or receivable by Desjardins.
>
> f. Rights to seek resumption of SERP payments from ACI or otherwise.
>
> g. All other issues reasonably pertaining to the Secured SERP Entitlements.

(ii) Orders that the Petitioners shall respond to reasonable disclosure requests pertaining to Secured SERP Entitlements made from William Sheffield as representative of the steering committee of the Secured SERPs, including, without limitation in connection with:

a. SERP plan documents (original and as amended over time).

b. past correspondence to Secured SERPs.

c. past correspondence with Desjardins.

d. Correspondence and reports of actuaries on the SERPs.

e. the process by which Letter of Credit amounts were determined from time to time.

f. the process by which Secured SERPs were listed as secured.

g. the process by which the SERP security became underfunded and the decision to cease funding.

3. **THE WHOLE WITH COSTS IF THIS CONTESTATION IS OPPOSED.**

Toronto, Ontario, November 16, 2009

Baker & McKenzie LLP
Attorneys for the Proposed Representative

AFFIDAVIT

I, the undersigned, William Sheffield having my principal place of business at Toronto, Ontario solemnly declare the following:

1. I am a member of the *Ad Hoc* Committee of Secured SERP and MSBA participants.

2. All the facts alleged in this motion are true to be the best of my knowledge and ability.

AND I HAVE SIGNED

W. A. Sheffield

WILLIAM SHEFFIELD

Solemnly declared before me at Toronto, Ontario, on the 16th day of November, 2009.

Commissioner for oaths
and Notary Public

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*)

NO.: 500-11-036133-094

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